

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

KRAFT FOODS GLOBAL, INC., et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:11-cv-08808
)	Judge Steven C. Seeger
UNITED EGG PRODUCERS, INC., et al.,)	
)	
Defendants.)	

**DEFENDANTS' MOTION IN LIMINE TO EXCLUDE NEWLY-IDENTIFIED
LAY WITNESSES AND LAY "SUMMARY" TESTIMONY
BASED ON STATEMENTS OF GENE GREGORY**

In addition to two outside consultants – Nathan Blalock, an economic consultant at NERA, and David Tantlinger, a CPA at Tantlinger & Associates – Plaintiffs have newly identified two lay witnesses to testify at the upcoming damages phase trial: Vinay Vallabh of Kellogg and Douglas Keaton of Nestle USA. For many of the same reasons that Defendants have described for excluding Mr. Blalock and Mr. Tantlinger (*see* ECF No. 580), Mr. Vallabh and Mr. Keaton should be excluded from testifying too.

First, neither was ever disclosed as potential testifying witnesses. This Court's Standing Order on the final pretrial order clearly states that “[a]ny witness not listed in the Final Pretrial Order will be precluded from testifying absent a showing of good cause[.]” (*See* Standing Order on Preparation of Final Pretrial Order for Civil Cases Before Judge Seeger at ¶ 8.) Plaintiffs' newly-disclosed witnesses should have been identified much earlier. Indeed, it was only a few months ago when the Court decided that the trial would be bifurcated, a request that Plaintiffs opposed. (*See* ECF No. 261.) For 99.9% of the history of this case, Plaintiffs assumed that both liability and damages would be resolved in a single trial. Their witnesses for both phases were

required to be and should have been disclosed long before now. This is reason enough to exclude Mr. Vallabh and Mr. Keaton.

Second, the proposed testimony of Mr. Vallabh and Mr. Keaton is improper. What they, and Kellogg witness Kelly Tobey, apparently will say will be “summary” testimony. But the descriptions of their proposed testimony do not qualify as a “summary.” These witnesses instead intend to be the mouthpieces for Gene Gregory’s statements and opinions. As explained in Defendants’ Motion to Exclude Testimony of Nathan Blalock and David Tantlinger (ECF No. 580), that is not permissible “summary” testimony. It is expert testimony disguised as lay testimony.

Finally, any testimony whether “summary” or not intended to bolster Gene Gregory’s statements as the basis for damages would also be newly-disclosed and improper. In the proposed Final Pretrial Order, Plaintiffs were required to describe the relief that they were seeking in this case. In the “Relief Sought” section of the proposed Final Pretrial Order, Plaintiffs said simply that they were claiming “[t]rebled monetary damages for overcharges as detailed in the expert report of Michael Baye.” (*See ECF No. 279 at 6.*) Nothing in the Final Pretrial Order said anything about damages based on Gene Gregory’s statements. For Plaintiffs to present this new theory of relief would be a surprise. After twelve years of litigation, it should not be allowed.

In short, Plaintiffs’ newly-identified lay witnesses should not be permitted to testify and their newly-developed theory of relief should not be allowed to be presented to the jury. For these reasons, Defendants respectfully request that this motion be granted.

Dated: November 27, 2023

Respectfully submitted,

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